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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Implementation of the)	
Telecommunications Act of 1996:)	CC Docket No. 96-152
)	
Telemessaging,)	
Electronic Publishing, and)	
Alarm Monitoring Services)	

NYNEX REPLY COMMENTS

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SUMMARY

This is a proceeding to establish rules to clarify and implement the non-accounting separated affiliate and nondiscrimination safeguards prescribed by Congress in sections 274, 275, and 260 of the Telecommunications Act of 1996 (the “1996 Act”). NYNEX urges the Commission to adopt rules which enhance the pro-consumer and other competitive benefits that will result from eliminating artificial statutory and regulatory barriers to full BOC participation in the electronic publishing, alarm monitoring, and telemessaging services markets. In doing so, the Commission should recognize and preserve the careful balance struck by Congress in adopting this legislation, which protects against potential anti-competitive conduct by the BOCs while at the same time promoting full BOC competitive entry into these markets.

Several parties to this proceeding seek to undermine this careful balance achieved by Congress by having the Commission impose on the BOC provision of electronic publishing, alarm monitoring and telemessaging services a vast array of unnecessary regulations and requirements which are contrary to the clear intent of the 1996 Act and which would impose excessive and uneconomic burdens on the BOCs. The Commission should reject the arguments of such parties as contrary to clearly expressed Congressional intent. In these Reply Comments, NYNEX will address the comments of other parties to this proceeding in the following areas:

Structural Separation and Transactional Requirements. Congress authorized the BOCs to engage in electronic publishing in accordance with rules specifically enumerated in section 274. Several commenters would have the Commission ignore the express intent of Congress and recommend that it adopt separation criteria far more expansive and burdensome than those specifically enumerated in section 274(b). The statute neither requires nor authorizes the Commission to impose any additional requirements on the BOC provision of electronic publishing services, and the Commission should reject proposals that it do so.

Marketing Provisions. Congress intended the joint marketing restrictions contained in section 274(c) to apply only to the BOC. The statute does not prohibit a separated affiliate from jointly marketing electronic publishing services and a BOC's telecommunications services. This activity is consistent with the Congressional goal to provide consumers with "one-stop shopping."

Definition of Electronic Publishing; Relationship of Sections 272 and 274. The Commission should clarify that the statutory exclusion of the transmission of information as part of a gateway to an information service from the definition of electronic publishing includes a home page, electronic links to other Internet sites, and introductory information. This exception is consistent with Congressional intent that electronic publishing consist of a BOC's controlling, or having a financial interest in, information

transmitted over its own local exchange network. Software browsers are also properly excluded from the definition of electronic publishing.

An affiliate providing both electronic publishing and services covered by section 272 must comply with the requirements of both sections 274 and 272 on a service by service basis, not with the requirements of both sections with respect to all services offered by the affiliate.

Nondiscrimination Safeguards. There is no need for the Commission to adopt additional regulations to implement the nondiscrimination requirements of section 274(d) or to impose Computer III and Open Network Architecture rules on the provision of electronic publishing services. Commenters who argued that the Commission should continue to apply the requirements of CI-III and ONA fail to recognize that these requirements are rendered unnecessary by section 274 structural separation requirements. Section 274(d)'s requirement of "just and reasonable rates" does not prohibit volume discounts that a BOC makes available to affiliated and non-affiliated electronic publishers.

Telemessaging. Section 260(a) clearly only requires incumbent LECs to treat all telemessaging providers in a nondiscriminatory manner in their provision of telecommunications services. It does not require or support the imposition on incumbent LECs of additional obligations, such as collocation, access to network elements, or provision of internal corporate resources. Neither does the statute require incumbent LECs to respond to interconnection or unbundling requests made by telemessaging providers. Any such obligations go beyond the specific requirements of the statute.

Enforcement Processes. Certain commenters contend that the burden of proof should be shifted to the BOCs to disprove allegations in section 274 enforcement proceedings. These parties offer no convincing support for their arguments. A shift in the burden of proof would be contrary to fundamental notions of administrative law and due process.

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NYNEX REPLY COMMENTS

NYNEX Corporation ("NYNEX"), on behalf of its operating subsidiaries, hereby files its Reply Comments in response to comments to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. In this proceeding, the Commission will establish rules to clarify and implement the non-accounting separated affiliate and nondiscrimination safeguards prescribed by Congress in sections 274, 275, and 260 of the Telecommunications Act of 1996 (the "1996 Act"). In enacting this legislation, Congress fully recognized and hoped to achieve the pro-consumer and other competitive benefits that would result from eliminating artificial statutory and regulatory barriers to full BOC participation in the electronic publishing, alarm monitoring and telemessaging services markets. To attain this goal, Congress struck a careful balance in the legislation, which protects against potential anti-competitive conduct by the BOCs

while at the same time promoting full BOC competitive entry into these markets. The Commission has appropriately recognized that permitting the BOCs to engage in electronic publishing, telemessaging, and alarm monitoring services will foster competition.¹ As noted in its Comments, NYNEX agrees with the Commission that any rules adopted to prevent potential anticompetitive behavior by the BOCs must achieve that objective “without depriving those carriers of legitimate competitive advantages that can benefit both subscribers to their . . . local services and consumers of the carriers’ new services.”² NYNEX urges the Commission to adopt rules in this proceeding to achieve these pro-consumer and pro-competitive results.

Several parties to this proceeding would foreclose the BOCs from passing on to consumers the benefits of their legitimate competitive advantages by having the Commission impose a vast array of unnecessary regulations and requirements on the BOC provision of electronic publishing, telemessaging, and alarm monitoring services that are neither required nor permitted by the 1996 Act. These proposals are contrary to the clear intent of the statute, and would impose excessive and uneconomic burdens on the BOCs. These parties seek to achieve by Commission regulation requirements which Congress, after balancing all factors, found unnecessary. We urge the Commission not to upset the careful balance achieved by Congress and accordingly urge the Commission not to adopt unnecessary, burdensome and uneconomic regulations.

¹ NPRM ¶ 6.

² NPRM ¶ 8. See NYNEX 3.

These Reply Comments focus on the following major areas raised in the Comments of the various parties: (1) structural separation and transactional requirements for electronic publishing; (2) provisions governing BOC and separated affiliate marketing of electronic publishing services; (3) the definition of electronic publishing and the relationship of section 272 to section 274; (4) the nondiscrimination requirements of section 274(d); (5) telemessaging; and (6) enforcement issues under section 274.

I. STRUCTURAL SEPARATION AND TRANSACTIONAL REQUIREMENTS (NPRM ¶¶ 35-46)

In Section 274(b), Congress spelled out specific and detailed requirements for the structural separation of an electronic publishing separated affiliate or joint venture from the BOC with which it is affiliated. These requirements are plain on their face and do not need to be supplemented with additional regulations. Several commenters, however, recommend that the Commission adopt separation criteria far more expansive and burdensome than those specifically enumerated in section 274(b). These commenters ask the Commission to ignore the express intent of Congress and impose restrictions which Congress could have chosen to adopt, but did not. Further, nothing in section 274 requires or authorizes the Commission to impose any additional requirements on the BOC provision of electronic publishing services. As USTA points out, section 274 is “self-executing, and [does] not require the Commission to institute rulemaking proceedings or implement new regulations.”³ We further address these proposals below.

³ USTA 2.

A. “Operate Independently” Requirement (Section 274(b))

Section 274(b) requires generally that a separated affiliate or joint venture must be “operated independently” from the BOC. Subsection (b) goes on to enumerate specific requirements designated by Congress to ensure this operational independence. As pointed out by USTA, this list is comprehensive and complete.⁴ There is neither statutory authority nor any need for the Commission to supplement this list by imposing additional requirements.

AT&T and Time Warner argue that the Commission should interpret the “operate independently” requirement as a specific obligation requiring the Commission to adopt additional rules.⁵ AT&T would have the Commission go way beyond the expressed intent of Congress, asserting that “the Commission is authorized to adopt whatever additional

⁴ USTA 4.

⁵ AT&T 14; Time Warner 12. Time Warner suggests that electronic publishing joint ventures be treated the same as separated affiliates and that the Commission interpret the “operate independently” requirement to impose restrictions on the joint ownership of property by a joint venture and a BOC. Id. at 10, 17. MCI argues that the operate independently requirement does not have a different meaning for separated affiliates and electronic publishing joint ventures, and that the restrictions of section 274(b)(5) should apply to joint ventures as well as to separated affiliates. MCI 4, 5. These proposals ignore the plain language of the statute. The nine requirements for independent operation listed in section 274(b) are unambiguous and apply differently to separated affiliates and electronic publishing joint ventures. For example, section 274(b)(5) prohibits a BOC and its separated affiliate from having officers, directors, and employees in common or owning property in common. The restriction does not apply to a BOC and an affiliated electronic publishing joint venture. Similarly, section 274(b)(7) prohibits a BOC from performing hiring of personnel, purchasing, installation, or maintenance of equipment, and engaging in research and development, for a separated affiliate. A BOC is permitted to perform these activities for an electronic publishing joint venture. Thus “[t]he required separation between a BOC and a separated affiliate is greater than between a BOC and an electronic publishing joint venture. In the case of a joint venture, the BOC is not the only owner; the presence of outside interests lessens the BOC’s incentive to cross subsidize or discriminate in favor of a joint venture.” NAA 4.

regulations it deems necessary beyond the nine subsections of section 274(b) to assure that operational independence between the BOC and its separated affiliate or electronic publishing joint venture is a reality.”⁶ AT&T argues specifically that the Commission should impose CI-II rules on the requirements enumerated by Congress in section 274. AT&T offers absolutely no support, by way of statutory language or legislative history, to back up these arguments. Similarly, Time Warner recommends the adoption of a whole array of additional restrictions as part of the “operate independently” requirement, including separate computer facilities, separate physical space, and separate software development.⁷ Congress was plainly aware of Computer II and other potential safeguards when it enacted section 274 and could have explicitly included all or some of the safeguards it rejected in section 274. In choosing not to do so, Congress clearly expressed its judgment that the specifically enumerated requirements of section 274 were sufficient to assure operational independence. It would be inappropriate for the Commission to undermine the clear intent of Congress by imposing the additional and unnecessary requirements suggested by AT&T and Time Warner.

NYNEX also notes that a BOC separated affiliate is free to provide exchange service through facilities of its own. Time Warner would have the Commission interpret the “operate independently” requirement to prohibit the separated affiliate or joint venture from constructing, owning, or operating its own transmission facilities.⁸ There is no

⁶ Id.

⁷ AT&T 14, Time Warner 12-13.

⁸ Time Warner 13.

logical basis to Time Warner's position. Further, there is absolutely no support in the language of section 274, or elsewhere in the 1996 Act or its legislative history, which substantiates Time Warner's view.

B. Separate Credit (Section 274(b)(2))

Section 274(b)(2) requires that a separated affiliate or electronic publishing joint venture not incur debt in a manner that would permit its creditor to have recourse to the assets of the BOC. No rules implementing this provision are necessary. NYNEX agrees with the Commission's tentative conclusion that "a BOC may not cosign a contract, or any other instrument, with a separated affiliate or an electronic publishing joint venture that would incur debt in violation of section 274(b)(2)."⁹ AT&T and MCI contend, however, that the Commission should also prohibit any arrangement which might permit a creditor of the separated affiliate or joint venture to have recourse to the assets of the parent of the BOC.¹⁰ Section 274(b)(2) is explicit -- the separated affiliate or joint venture may not obtain credit in a way which permits creditors to have recourse to *BOC assets*. The BOC's parent's assets are distinct, and are not subject to the same restriction. The proposed expansion of the plain meaning of section 274(b)(2) suggested by AT&T and MCI is unwarranted.

⁹ NPRM ¶ 37.

¹⁰ AT&T 15-16, MCI 47.

C. Separate Officers, Directors, and Employees; Common Ownership of Property (Section 274(b)(5))

NYNEX demonstrated in its Comments that section 274(b)(5)(A) cannot be read to preclude the provision of corporate governance functions and administrative support services from a holding company or other service entity.¹¹ AT&T contends that the Commission should prohibit a BOC from establishing a second affiliate to perform services or own property for both the BOC and its electronic publishing separated affiliate, contending that “[s]uch an arrangement would result in an obvious sharing of personnel or property in violation of both the letter and the intent of Section 274(b)(5).”¹² However, AT&T points to nothing in the language of the 1996 Act or its legislative history which supports its argument that corporate governance functions and administrative services of the kind NYNEX described in its Comments, which the Commission has long considered appropriate for sharing under Computer II, cannot be provided on a centralized basis.

As NYNEX noted in its Comments, section 274(b)(5)(B) states clearly that a BOC and its separated affiliate may “own no property in common.”¹³ NYNEX reiterates that jointly leasing property or sharing of space by a BOC and its separated affiliate is permitted, as long as the transaction is pursuant to a written contract and publicly available.¹⁴ As USTA notes, “[t]he Commission must continue to recognize the

¹¹ NYNEX 13-18.

¹² AT&T 17.

¹³ NYNEX 9-10.

¹⁴ See also USTA 4, Ameritech 13, U S West 19.

economics of integration derived from sharing which it has allowed in the past even under its Computer II separation requirements.”¹⁵

D. Use of BOC Name, Trademarks, and Service Marks; Research and Development (Sections 274(b)(6) and (7)(C))

Time Warner urges the Commission to clarify that the prohibition against a separated affiliate or electronic publishing joint venture using the BOC's name, trademarks, or service marks, contained in section 274(b)(6), should apply to all names, trademarks and service marks which a BOC and its parent company both use.¹⁶ This suggestion ignores the fact that the statute prohibits the separated affiliate only from using the name, trademarks, or service marks of *an existing BOC*.¹⁷ There is no prohibition against use of names, trademarks or service marks owned by the parent company of a BOC. If Congress had intended a more expansive application of this prohibition, it specifically would have so provided. It would be inappropriate for the Commission to expand the plain meaning of the statute as requested by Time Warner.

NYNEX agrees with USTA that the Commission should not restrict BOC research and development activities by prohibiting the BOCs from sharing any research or development work or results with their electronic publishing affiliates, as Time Warner suggests.¹⁸ Section 274(b)(7)(C) prohibits a BOC from performing research and

¹⁵ USTA 4.

¹⁶ Time Warner 16-17.

¹⁷ Section 274(b)(6).

¹⁸ USTA 5, Time Warner 19-20.

development *on behalf of* a separated affiliate. This provision prohibits a BOC only from conducting research and development for the benefit of its electronic publishing affiliate.¹⁹ As USTA points out, “[i]ndependent research and development, even if of potential use to an affiliate, and sharing general findings with an affiliate are not prohibited by the statute.”²⁰ The Commission should not adopt rules which go beyond what is required by the Act.

II. MARKETING PROVISIONS (NPRM ¶¶ 49-63)

Some parties assert that the marketing provisions of section 274(c) prohibit any joint marketing of a BOC’s services with the electronic publishing services of its separated affiliate(s).²¹ This argument ignores the plain, explicit language of the statute. Section 274(c) states that “*a Bell operating company shall not carry out any promotion, marketing, sales or advertising for or in conjunction with a[n electronic publishing] separated affiliate.*”²² Thus, while a BOC may not jointly market its services with the electronic publishing services of a separated affiliate, there is no statutory prohibition on the separated affiliate performing these joint marketing activities.²³ As would be the case

¹⁹ See U S West 20, Pacific Telesis 12-13, Ameritech 15.

²⁰ USTA 5.

²¹ Time Warner 24-25, AT&T 20, NAA 6.

²² Section 274(c)(1) (emphasis supplied).

²³ NYNEX supports the comments of Bell South and others who point out that a BOC is permitted to market and jointly sell other services, such as directory services or book publishing, provided by an affiliate, including a separated affiliate, which are not electronic publishing. Bell South 17, SBC 11.

with unaffiliated electronic publishers, a separated affiliate is free to purchase its affiliated BOC's tariffed services and resell those services, along with its own electronic publishing services, and to sell the BOC's services as its sales agent, thereby providing the "one-stop shopping" recognized by the Commission as a benefit Congress wanted to make available to consumers.²⁴

Unable to find any express prohibition in the 1996 Act on the joint marketing of BOC services by a separated affiliate, Time Warner argues that joint marketing of a BOC's local exchange services with the in-region electronic publishing services of its separated affiliate would violate the "operate independently" requirement of section 274(b).²⁵ Time Warner offers no support for this assertion and its argument is clearly without merit.

NYNEX showed in its Comments that section 274(c)(2)(A) permits a BOC to provide a broad range of inbound telemarketing and referral services related to electronic publishing.²⁶ The Commission asked in the NPRM whether section 274(c)(2)(A) was inconsistent with section 274(b)(5)(A), which prohibits a BOC and its separated affiliate from sharing employees. See NPRM ¶ 40. NYNEX agrees with Bell Atlantic's comment

NYNEX also agrees with USTA and other commenters that nothing in the 1996 Act prevents a BOC from carrying out joint marketing activities with an affiliate that acts as a sales agent for the sale of the BOC's services, or from performing marketing as an agent for both the BOC and the separated affiliate, as long as that affiliate is not a "separated affiliate" and is not owned or controlled by the BOC. USTA 5, Bell Atlantic 9, SBC 11.

²⁴ NPRM ¶ 6.

²⁵ Time Warner 27.

²⁶ NYNEX 20-21.

that it is unnecessary for a BOC and a separated affiliate to have employees in common to engage in this permissible joint marketing.²⁷ Section 274(c)(2)(A) therefore is not inconsistent with section 274(b)(5)(A)'s prohibition on common employees.

Section 274(c) also permits BOCs to participate in electronic publishing joint ventures on "a nonexclusive basis."²⁸ NYNEX agrees with the Newspaper Association of America's interpretation that "[t]his requirement does not mean that a joint venture must be open to all parties, or that the BOC cannot exercise its own business judgment about joint venture partners."²⁹ A BOC could not, however, agree with its joint venture partners that it would not participate in any other electronic publishing joint venture.

III. DEFINITION OF ELECTRONIC PUBLISHING; RELATIONSHIP OF SECTIONS 272 AND 274 (NPRM ¶¶ 29-31, 48)

A. Definition of Electronic Publishing

There was strong industry support in this proceeding for the proposition that for a BOC information service to be considered an electronic publishing service, there has to be BOC control of, or financial interest in, the content of the information that is transmitted over its network and that a service that merely facilitates access to content provided by others is not an electronic publishing service. For example, the Newspaper Association of America noted that "in several of the exceptions to the definition [of electronic

²⁷ Bell Atlantic 11.

²⁸ Section 274(c)(2)(C).

²⁹ NAA 9.

publishing], Congress suggested that 'the generation or alteration of the content of information' was characteristic of electronic publishing."³⁰ The Commission should therefore adopt a definition, consistent with the 1996 Act, which clarifies that electronic publishing includes only those services for which the BOC controls, or has a financial interest in, the content of the information the BOC transmits over its network and that providing a service which merely facilitates access to content provided by others is not an electronic publishing service.³¹

Several parties urge the Commission to clarify the exclusion from the definition of electronic publishing of "the transmission of information as part of a gateway to an information service," contained in section 274(h)(2)(C). These parties point out that a "gateway" should include a home page that electronically links selected Internet sites or other home pages by a user clicking on a word or logo. In addition, they show that the gateway exception should include introductory information regarding an Internet service provider's services, such as electronic publishing services, as well as electronic linkages to those other services.³² NYNEX agrees with these interpretations. NYNEX also agrees with USTA and the Joint Parties that software browsers should be considered navigational

³⁰ NAA 3. See also, Joint Parties 3-4, USTA 3, YPPA 2-3.

³¹ Of course, other exceptions may apply. For example, electronic white pages listing services are excepted under section 274(h)(2)(I); traditional audiotext information services are excepted under section 274(h)(2)(D); and, data processing and transaction processing services performed on behalf of a customer or group of customers, such as records processing, image storage and retrieval, and database back-up services, are excepted under section 274(h)(2)(E).

³² USTA 3, Bell Atlantic 5, Joint Parties 3-4, Ameritech 8-9.

systems which are excluded from the definition of electronic publishing by section 274(h)(2)(C).

B. Relationship of Sections 274 and 272

The Commission sought comment on whether a BOC may provide electronic publishing services through the same affiliate through which it provides interLATA information services and other services subject to the requirements of section 272, and if it chose to do so, whether the BOC would have to comply with the requirements of section 272, section 274, or both.³³ Commenters addressing these questions were unanimous in their agreement that a BOC may provide electronic publishing services through the same entity or affiliate through which it provides its interLATA information services. As NYNEX pointed out in its Comments, if a separated affiliate offering electronic publishing services chooses also to provide services that require a separate affiliate under section 272, it would logically have to comply with the requirements of both sections 274 and 272 on a service by service basis.³⁴ Thus, the affiliate would have to satisfy the separation requirements common to both sections of the statute, but would be required to comply with the unique requirements of sections 274 and 272 only with respect to the activities specified in the statutory section applicable to those activities.³⁵

³³ NPRM ¶ 48.

³⁴ NYNEX 5.

³⁵ Other commenters agree with this analysis. See, e.g., Pacific Telesis 13-14. U S West notes that "While a 'multi-purpose' affiliate would be required to 'operate independently' from the BOC (due to the express requirements of sections 272(b)(1) and 274(b)), the exact manner in which that affiliate is

For example, should a BOC decide to offer interLATA telecommunication services and electronic publishing through the same affiliate, the affiliate would have to meet the structural separation requirements of both section 272(b) and section 274(b). Yet, when providing interLATA telecommunication services, the affiliate would be required to follow the joint marketing requirements of section 272(g), but when providing electronic publishing, the affiliate would be required to follow the joint marketing requirements of section 274(c). There is no support in the statute for the contention of some commenters that the affiliate providing section 274 services and section 272 services would have to comply with all of the requirements of both sections.³⁶ Congress created certain specific and separate requirements for electronic publishing and interLATA information services. It would be inconsistent with Congressional intent to apply the specific requirements intended for one class of services to the other just because such services are being provided thorough a single corporate entity.

Similarly, it would be inconsistent with Congressional intent to require that a BOC affiliate providing interLATA electronic publishing services (and not offering other services which fall within the purview of section 272) comply with the requirements of section 272. AT&T argues that, because section 272(a)(2)(B) requires a BOC to use a separate affiliate that complies with the structural separation and nondiscrimination requirements of section 272 to offer "origination of interLATA telecommunications

required to operate would depend upon each of the services provided by that affiliate and the statutory separation and transactional requirements associated with each service." U S West 4.

³⁶ See AT&T 19, Time Warner 31, MCI 6.

services” in its region, the requirements of section 272(a) apply to any interLATA information service that originates in a BOC’s region, including electronic publishing.³⁷ This assertion ignores the fact that Congress created a separate section in the Act specifically addressing electronic publishing, and that section 272(a)(2)(C), which requires the BOC to satisfy section 272’s separate affiliate requirements for “interLATA information services,” specifically excludes electronic publishing.³⁸ Unlike section 272, section 274 makes no distinction between intraLATA and interLATA electronic publishing. Congress clearly intended that the BOC provision of both intraLATA and interLATA electronic publishing be governed by the requirements of section 274 and not by section 272.

IV. NONDISCRIMINATION SAFEGUARDS (NPRM ¶¶ 64-77)

NYNEX showed in its Comments that there was no need for the Commission to adopt additional regulations to implement the nondiscrimination requirements of section 274(d) or to impose the requirements of Computer III and Open Network Architecture (“ONA”) on the provision of electronic publishing services.³⁹ Section 274(d) requires a BOC to “provide network access and interconnections for basic telephone service to

³⁷ AT&T 2-3.

³⁸ Section 272(a)(2)(C) states: “(2) The services for which a separate affiliate is required by paragraph (1) are: . . . (C) InterLATA information services, other than electronic publishing (as defined in section 274(h). . . .”

³⁹ NYNEX 23-24.

electronic publishers at just and reasonable rates that are tarified” This language is clear and specific. There is no need for additional regulations to clarify or implement this section. Further, if Congress had intended that the Commission adopt regulations to implement the nondiscrimination requirement, it would have so specified. Unlike section 274(b)(4), where Congress did require the Commission have in effect regulations with respect to the valuation of assets transferred from a BOC to a separated affiliate, and the recording of such a transfer, section 274(d) contains no such requirement.

Some commenters agreed with the Commission’s tentative conclusion that the requirements of Computer III and ONA should continue to apply to the extent they were not inconsistent with section 274(d).⁴⁰ Their arguments in support of this position, to the extent made at all, are not persuasive. AT&T suggests that because the BOCs still possess substantial market power in their respective in-region local exchange market areas, the same conditions that led the Commission to impose nondiscrimination requirements on the BOCs in its Computer III proceeding exist today, thereby justifying the continued applicability of Computer III and ONA.⁴¹ This statement ignores the fact that Congress carefully considered and addressed the terms and conditions under which BOCs should offer new or competitive services, and applied in the 1996 Act specific structural and non-structural safeguards against potential misuse of the BOCs’ market

⁴⁰ Time Warner 22, AT&T 21, MCI 7.

⁴¹ AT&T 21.

power where it deemed them appropriate. It would be inappropriate for the Commission to impose safeguards when Congress chose to exclude them.

As NYNEX pointed out in its Comments, another layer of safeguards or conditions would frustrate Congressional intent to eliminate excessive regulatory barriers to entry by the BOCs into new telecommunications markets, thereby undermining the BOCs' ability to pass on to consumers lower prices that result from operational efficiencies and economies of scope.⁴² Further, these parties and the Commission fail to recognize that the separated affiliate requirements established by section 274 are a form of structural separation comparable to CI-II and afford comparable nondiscriminatory protections. Because enhanced services offered under a CI-II structural separation framework are not subject to CI-III or ONA requirements as they are not offered on an "integrated" basis, electronic publishing services offered through a section 274 separated affiliate also should not be subject to CI-III or ONA.⁴³

A. Just and Reasonable Rates

Section 274(d) requires a BOC to provide network access and interconnections for basic telephone service to electronic publishers "at just and reasonable rates. . .that are not higher on a per-unit basis than those charged for such services to any other electronic

⁴² NYNEX 24.

⁴³ For enhanced services that are offered under a CI-II structurally separate subsidiary, a BOC does not have to comply with certain CI-III and ONA requirements, such as the requirement to file market trial notices, CEI Plans or parity reports. See In The Matter Of Bell Operating Companies Joint Petition for Waiver of Computer II Rules, released January 11, 1995, para. 1, fns. 4, 5.

publisher or any separated affiliate” NYNEX agrees with USTA and Bell Atlantic that this language does not require per-unit rates to be identical, and that volume and term discounts are lawful as long as the same discounts are made available to other electronic publishers.⁴⁴ Under section 274, any transactions not subject to tariff must be reduced to writing and made publicly available. As Bell Atlantic points out, this disclosure requirement ensures that other electronic publishers will be aware of any discounts a BOC provides to its affiliate.⁴⁵

V. TELEMESSAGING (NPRM ¶¶ 75, 77)

Certain parties incorrectly argue that the nondiscrimination safeguards of section 260(a)(2) place obligations on an incumbent LEC which go beyond the statutory requirement that an incumbent LEC “shall not prefer or discriminate in favor of its telemessaging service operations in its provision of telecommunications services.” For example, Voice-Tel argues that an incumbent LEC which chooses to collocate its telemessaging equipment within its switching centers must offer the same collocation opportunity to competitive telemessaging providers.⁴⁶ Voice-Tel also argues that an incumbent LEC may utilize its company resources to market, advertise or bill for its own telemessaging service only if it does so for competitive telemessaging providers.⁴⁷ ATSI

⁴⁴ USTA 6, Bell Atlantic 12. See also PacTel 22-23.

⁴⁵ Bell Atlantic 12.

⁴⁶ Voice-Tel 5.

⁴⁷ Voice-Tel 10-11.

goes even further and argues that unless a telemessenger can "secure access to the necessary network functions and features to offer the value-added services expected by the communications customer," the LEC has violated section 260(a).⁴⁸

It is clear that the statutory language does not support such obligations. Under the statute, an incumbent LEC is only required to treat all telemessaging providers in a non-discriminatory manner *in its provision of telecommunications services*. As such, the statute simply requires that affiliate and non-affiliate telemessaging providers: (a) be given access to the LEC's network features, functions and services; and (b) be treated equally by the LEC relative to the provisioning, maintenance and repair of those network features, functions, and services. The statute in no way requires an incumbent LEC to give competing telemessaging providers access to its own internal resources, such as collocation, marketing services, or advertising.⁴⁹ Similarly, the statute does not require that an incumbent LEC respond to interconnection or unbundling requests made by telemessaging providers.⁵⁰

⁴⁸ ATSI 9.

⁴⁹ It should be noted that the Commission addressed these same issues in its CI-III and ONA proceedings and, while requiring that affiliate and non-affiliate enhanced service providers be given comparably efficient interconnection to a BOC's network services and be treated in a nondiscriminatory manner relative to the provisioning and maintenance of those network services, it did not require the BOCs to share their corporate resources, such as collocation or equal access to billing, marketing or advertising resources. See generally, In the Matter of Filing and Review of Open Network Architecture Plans, CC Docket 88-2, Phase One, released December 22, 1988.

⁵⁰ In arguing that section 260 requires an incumbent LEC to provide all telemessaging providers with access to network functions, ATSI fails to recognize that it is section 251, not section 260, that defines an incumbent LEC's obligations relative to interconnection, unbundling and collocation. Section 251 requires the incumbent LEC to provide those items only to requesting *telecommunication carriers*. Section 251(c)(2). Telemessaging providers, as such, are not telecommunications carriers. At this time,